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No. 92-1516

IN THE

Supreme Court of the United States

October Term, 1992

MAGNESIUM ELEKTRON, INC.,
Petitioner,

vs.

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC. and FRIENDS OF THE EARTH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE CHEMICAL INDUSTRY COUNCIL OF NEW JERSEY AND THE NEW JERSEY STATE CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER

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The Chemical Industry Council of New Jersey ("CIC/NJ") and the New Jersey State Chamber of Commerce (the "Chamber") respectfully move this Honorable Court for leave to file a brief *amici curiae* in this case in support of the Petition for Writ of Certiorari filed by Petitioner Magnesium Elektron, Inc. The Petitioner seeks review of the December 15, 1992 decision of the United States Court of Appeals for the Third Circuit affirming the decision of the United States District Court, District of New Jersey, dated January 23, 1992, both of which are reproduced in the Appendix of Petitioner at A1-A32.

Counsel for Petitioner has consented to the filing of a brief *amici curiae* by the CIC/NJ and the Chamber, and the consent letter is reproduced in the Appendix at A1. Counsel for Respondents Public Interest Research Group of New Jersey, Inc. and Friends of the Earth did not consent to the filing of an *amici curiae* brief.

Amicus CIC/NJ is a trade association comprised of 105 chemical and allied product manufacturers which have facilities throughout the State of New Jersey. CIC/NJ's member companies include bulk and specialty chemical manufacturers, pharmaceutical companies, flavor and fragrance manufacturers, as well as formulators and fabricators. These companies produce a variety of materials used in agriculture, medicine, construction, mining, manufacturing, textiles, and in the cosmetic and food processing industries. The materials and products are used by industry as well as in the home and in protection of the environment. Companies affiliated with CIC/NJ include large operating facilities, small-scale facilities, research and development centers and satellite sales offices. There are approximately

119,000 people in the State of New Jersey who are employed in the chemical industry. Its total shipments are estimated at $20.3 billion annually.

The Chamber serves the business community in the State of New Jersey by providing a vehicle for political action and business advocacy through a network of businesses, local chambers of commerce, and other community organizations. The Chamber was established in 1911 and was intended to serve as a liaison between the public and private sectors and to act as "the voice of business" in New Jersey. The Chamber currently has almost 2,000 members and the various chamber organizations in New Jersey represent over 45,000 businesses. The Chamber supports measures designed to safeguard the state's environment that are rooted in sound science and technology. The Chamber is committed to presenting New Jersey as a good place in which to work and to do business. However, the Chamber recognizes that in order to advocate the advantages of conducting business in the state, there must be realistic laws and governmental policies that will encourage private industry to expand its facilities or relocate to New Jersey.

Environmental laws and regulations have and will continue to have a profound impact on the state's economy. Thus, environmental issues will remain a priority of *amici*. Many environmental laws and regulations depend on inexact regulatory standards. *Amici* believe that regulatory standards should be based on known health effects, impact on the environment and common sense.

The fundamental issue raised by the Petition for Writ in this case is the scope of the constitutional standing requirements applicable to citizen suit plaintiffs under section 505 of the Federal Water Pollution Control

Act, 33 U.S.C. §1365 (hereinafter the "Clean Water Act"). The United States Court of Appeals for the Third Circuit adopted a reduced standard for standing in Clean Water Act cases that allows a section 505 plaintiff to establish standing based solely on a showing of a violation of a defendant's National Pollution Discharge Elimination System/New Jersey Pollution Discharge Elimination System ("NPDES/NJPDES") permit, without a demonstration that plaintiff suffered any injury or that the alleged injury was caused by the defendant's conduct.

Amici are directly interested in this case because the Court of Appeals' misinterpretation of constitutional standing requirements for Clean Water Act citizen suits greatly expands citizens' entitlement to bring suit under the Clean Water Act as well as other environmental statutes. Moreover, the Court of Appeals' refusal to follow the "irreducible constitutional minimum" requirements for standing as set forth in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992) subjects *amici* and its members to protracted litigation even when there is no injury in fact.

The issues raised by the instant Petition for Writ of Certiorari directly affect *amici* and raise important questions regarding constitutional requirements for standing. This is true not only because *amici* and their members are subject to regulation under the Clean Water Act and private enforcement actions under section 505, but also because the Court of Appeals' decision may impact similar enforcement suits under a number of other environmental statutes. The decision below seriously prejudices *amici* by announcing a standard of broad applicability that would permit litigation by persons who, under the standards previously applied by this Court, would not have standing to sue.

In the accompanying brief, *amici* address these broad issues. *Amici* do so from the perspective of diverse organizations and industrial entities whose concerns regarding the decision below transcend this case. *Amici* believe that they can effectively contribute to the Court's understanding of the broader ramifications of the Court of Appeals' decision.

In view of the foregoing, *amici* the Chemical Industry Council of New Jersey and the New Jersey State Chamber of Commerce respectfully request that they be permitted to file the accompanying brief *amici curiae* in support of Petitioner.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. STATEMENT OF INTEREST OF *AMICI CURIAE* 1

II. REASONS FOR GRANTING THE WRIT ... 5

A. Petitioner's Writ Of Certiorari Should Be Granted Because The Third Circuit Failed To Comply With The Mandates Of The United States Supreme Court 5

B. The Court Of Appeals' Decision Renders Businesses Within The Third Circuit's Jurisdiction Competitively Disadvantaged And Discourages Businesses From Relocating To The Area 7

1. The Third Circuit's decision discourages process innovation 8

2. The Third Circuit's decision discourages improvements to the environment 12

C. This Court Should Grant Petitioner's Writ Of Certiorari Because A Standing Doctrine Without An Injury In Fact Requirement Undercuts A Working Relationship Between Business And Government 13

1. Businesses need a predictable relationship with government because they need to know who is setting policy . 15

2. Permitting standing without injury in fact permits policy to be formed by persons other than those responsive to the electorate 16

D. The Third Circuit's Environmental Group Exception To Article III's "Irreducible Constitutional Minimum" Threatens The Longstanding Doctrine Of Associational Standing 18

III. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Allen v. Wright, 468 U.S. 737 (1984) 5

Baker v. Carr, 369 U.S. 186 (1962) 5

Flast v. Cohen, 392 U.S. 83 (1968) 5

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977) 18

Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) ..... *passim*

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) .. 6,11

PIRG v. Powell Duffryn Terminals, Inc., No. 84-340 (D.N.J. April 23, 1991) 17

PIRG v. Powell Duffryn Terminals, Inc., 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991) 6,7,12,16,17

Sierra Club v. Morton, 405 U.S. 727 (1972) 18

Warth v. Seldin, 422 U.S. 490 (1975) 5,18

Constitutional Provisions

United States Constitution, Article III, §2, Clause 1 ..... *passim*

Statutes

Clean Air Act, 42 U.S.C. §7604 4

Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9659 4

Endangered Species Act, 16 U.S.C. §1540 4

Federal Water Pollution Control Act, 33 U.S.C. §§1251-1387 3

33 U.S.C. §1319 9

33 U.S.C. §1365 3,4,9

Marine Protection, Research and Sanctuaries Act, 33 U.S.C. §1415 4

Noise Control Act, 42 U.S.C. §4911 4

Outer Continental Shelf Lands Act, 43 U.S.C. §1349 4

Resource Conservation and Recovery Act, 42 U.S.C. §6972 4

Safe Drinking Water Act, 42 U.S.C. §300j-8 4

Surface Mining Control and Reclamation Act, 30 U.S.C. §1270 4

Toxic Substances Control Act, 15 U.S.C. §2619..... 4

Water Bank Act, Public Law, 91-559 and 96-182..... 13

Miscellaneous

Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983)..... 14

Supreme Court Rule 10.1(c)..... 6

Supreme Court Rule 37.2 1

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BRIEF *AMICI CURIAE* OF THE CHEMICAL INDUSTRY COUNCIL OF NEW JERSEY AND THE NEW JERSEY STATE CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER

Amici curiae, the Chemical Industry Council of New Jersey ("CIC/NJ") and the New Jersey State Chamber of Commerce (the "Chamber"), support the Petition for Certiorari of Magnesium Elektron, Inc., and respectfully request this Honorable Court to issue a writ of certiorari. *Amici* believe that the Third Circuit's decision in this case, which affirmed the decision of the United States District Court for the District of New Jersey without a written opinion, incorrectly interprets and applies the requirements for standing embodied in Article III, §2, Clause 1 of the United States Constitution. *Amici* further believe that the lower court opinion ignores this Court's decisions which define the appropriate standards for standing in environmental cases. In other words, the Third Circuit substantially reduced the "irreducible constitutional minimum" of standing articulated in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992).

Counsel for Petitioner has consented to the filing of this brief. See Appendix p. A1. Respondents have not consented and, therefore, *amici* have submitted this brief with a Motion for Leave to File a Brief *Amici Curiae* pursuant to Supreme Court Rule 37.2.

I. STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus the CIC/NJ is a trade association comprised of 105 chemical and allied product manufacturers which have facilities throughout the State of New Jersey. CIC/NJ's member companies include bulk and specialty chemical manufacturers, pharmaceutical companies, flavor and fragrance manufacturers, as well as formulators and fabricators. These companies produce a variety of materials used in agriculture, medicine, construction, mining, manufacturing, textiles, and in the cosmetic and food processing industries. The materials and products are used by industry as well as in the home and in protection of the environment. Companies affiliated with CIC/NJ include large operating facilities,

small-scale facilities, research and development centers and satellite sales offices. There are approximately 119,000 people in the State of New Jersey who are employed in the chemical industry. Its total shipments are estimated at $20.3 billion annually.

Amicus the Chamber of Commerce serves the business community in the State of New Jersey by providing a vehicle for political action and business advocacy through a network of businesses, local chambers of commerce, and other community organizations. The Chamber was established in 1911 and was intended to serve as a liaison between the public and private sectors and to act as "the voice of business" in New Jersey. The Chamber currently has almost 2,000 members and the various chamber organizations in New Jersey represent over 45,000 businesses. The Chamber supports measures designed to safeguard the state's environment that are rooted in sound science and technology. The Chamber is committed to presenting New Jersey as a good place in which to work and to do business. However, the Chamber recognizes that in order to advocate the advantages of conducting business in the state, there must be realistic laws and governmental policies that will encourage private industry to expand its facilities or relocate to New Jersey.

Environmental laws and regulations have and will continue to have a profound impact on the state's economy. Thus, environmental issues will remain a priority of *amici.* Many environmental laws and regulations depend on inexact regulatory standards. *Amici* believe that regulatory standards should be based on known health effects, impact on the environment and common sense.

The issues raised by Magnesium Elektron, Inc.'s Petition for Writ of Certiorari are of serious concern and consequence to *amici* because, like Petitioner, many of their member companies and affiliates are regulated

under the Federal Water Pollution Control Act, 33 U.S.C. §§1251-1387 (hereinafter the "Clean Water Act"). The fundamental issue raised by the Petition concerns the requisites for a plaintiffs' standing to bring a citizens' suit pursuant to section 505 of the Clean Water Act, 33 U.S.C. §1365. The United States Court of Appeals for the Third Circuit affirmed a standard which does not require section 505 plaintiffs to establish injury in fact or causation in order to have standing. That is, a plaintiff need show only that there was a discharge permit violation which caused or contributed to some general concern about pollution. As a result, the Third Circuit's standard for citizen suit standing violates the principles embodied in Article III of the Constitution, and is inconsistent with this Court's well-established requirements for standing. The Court of Appeals' decision significantly broadens the scope of standing in Clear Water Act cases and subjects environmentally inoffensive companies to increased litigation and massive liability for permit violations which do not and can not cause any real harm to plaintiffs or to the environment.

The Third Circuit's decision will also adversely affect *amici's* members in that it will discourage new businesses from relocating to the area within the Third Circuit's jurisdiction and will impede the growth of industry and business already in the area. This decision makes the environmental permitting process more complex and will operate as a disincentive to engage in innovative activities which may have unpredictable but innocuous results. Moreover, the decision puts companies within the jurisdiction of the Third Circuit at a competitive disadvantage with companies located in other circuits as well as in the international economy. In addition, it will interfere with the flexibility and discretion in the relationship between business and government by inserting into the regulatory process an unlimited number of private regulators who are not

responsible to the electorate. These unelected legislators will effect public policy based on personal interests rather than the public good.

The lower courts' decisions seriously prejudice *amici* and their members. *Amici* are not just concerned about the impact of the Third Circuit's decision on the doctrine of individual standing. As business organizations that from time to time advocate the interests of their members, CIC/NJ and the Chamber are also concerned about what these less stringent requirements mean for "associational" standing. Because of the symbiotic relationship between individual and associational standing, any reduction in standing requirements for individual members necessarily makes it easier for an association to file suit on their behalf. By substituting mere permit violations for demonstrations of injury in fact, the Third Circuit has substantially reduced the showing an individual must make in order to file a citizen suit under the Clean Water Act. *Amici* find this reduction in Article III's "irreducible constitutional minimum" particularly disturbing because the exception from Article III's strict standing requirements the Third Circuit appears to have created for environmental groups is an exception neither the Third Circuit nor Congress has any authority to create. The fact that citizen suit provisions can be found in nearly every environmental statute serves only to compound *amici's* concern.[1] *Amici* therefore request this Honorable Court to grant the Petition for Writ of Certiorari.

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[1] *See, e.g.*, Clean Air Act, 42 U.S.C. §7604 (Supp. 1991); Clean Water Act, 33 U.S.C. §1365 (1988); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9659 (1988); Endangered Species Act, 16 U.S.C. §1540(g) (1988); Marine Protection, Research and Sanctuaries Act, 33 U.S.C. §1415(g) (1988); Noise Control Act, 42 U.S.C. §4911 (1988); Outer Continental Shelf Lands Act, 43 U.S.C. §1349 (1988); Resource Conservation and Recovery Act, 42 U.S.C. §6972 (1988); Safe Drinking Water Act, 42 U.S.C. §300j-8 (1988); Surface Mining Control and Reclamation Act, 30 U.S.C. §1270 (1988); Toxic Substances Control Act, 15 U.S.C. §2619 (1988).

II. REASONS FOR GRANTING THE WRIT

Standing and the other justiciability requirements derive from the "case" or "controversy" limitation contained in Article III of the United States Constitution. This requirement limits federal judicial power to questions presented in an adversary context, capable of judicial resolution. *Flast v. Cohen*, 392 U.S. 83, 101 (1968). That "justiciability" requirement is essential to the separation of powers which is a hallmark of our form of government. As this Court has said, case or controversy doctrines are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

This Court has stated that the "Article III doctrine that requires a litigant to have 'standing' to invoke the power of a federal court is perhaps the most important of these doctrines." *Allen v. Wright*, 468 U.S. at 750. Standing generally requires that a plaintiff have a sufficient stake in the outcome of the suit. *Baker v. Carr*, 369 U.S. 186, 204 (1962). The standing doctrine is well-established and is a combination of constitutional requirements and prudential considerations.

A. Petitioner's Writ Of Certiorari Should Be Granted Because The Third Circuit Failed To Comply With The Mandates Of The United States Supreme Court.

This Court recently reaffirmed the traditional constitutional standing requirements in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992), where it stated:

> [T]he irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally-protected interest which is (a) concrete and

> particularized, and (b) 'actual and imminent, not "conjectural" or "hypothetical." ' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

(Citations omitted.) In direct contravention of these principles, the Court of Appeals' decision in this case eliminates these "irreducible constitutional minimum" requirements by allowing Respondents to maintain this action despite the fact that they have suffered no cognizable injury traceable to the permit excursions. Further, the test for causation articulated by the Third Circuit in *PIRG v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991), adopted by the district court and affirmed by the Court of Appeals is a meaningless, attenuated standard which abrogates the redressibility aspect of standing.

It is a well-established principle that this Court is the ultimate and final arbiter of the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Although divergence in views among the circuit courts is useful to help this Court focus on the precise issues at stake, once this Court has spoken and established the legal principle to be applied, circuit courts are not free to ignore them. This proposition is emphasized by Supreme Court Rule 10.1(c), which establishes as a standard for certiorari the failure to follow an applicable decision of this Court. Circuit courts may find new fact situations which justify a departure from a decision by this Court, or they may find distinguishable facts. But in either case, circuit courts are—and should be—required to account for and explain what they did and why they did it.

The Third Circuit's actions are not justified under the circumstances of the case. The district court clearly found standing based on principles that this Court has found inappropriate. The Third Circuit was obligated to either reverse or explain any circumstances which, in its view, justified deviation from this Court's edict.

B. The Court Of Appeals' Decision Renders Businesses Within The Third Circuit's Jurisdiction Competitively Disadvantaged And Discourages Businesses From Relocating To The Area.

Judge Aldisert, in his concurring opinion in *PIRG v. Powell Duffryn*, expressed a concern that citizen suit plaintiffs in Clean Water Act cases can sue simply because there is a permit violation:

> By enacting the Federal Water Pollution Control Act ("FWPCA"), especially the provisions that authorize any 'person or persons having an interest which is or may be adversely affected' to bring a suit 'against any person . . . who is alleged to be in violation of [a discharge permit],' Congress has expressed its enthusiastic support for the cleansing of our nation's waterways. *My concern is that this enthusiasm has led environmental organizations and citizen/plaintiffs to mistakenly believe they have standing to sue any time a discharge permit is violated.*

913 F.2d at 84 (citations omitted) (emphasis added).

The Court of Appeals' decision in this case effectively allows citizen suit plaintiffs to sue whenever there is a permit violation. The failure of the Third Circuit to acknowledge this Court's ultimate role in establishing legal principle is of great practical significance to *amici*. For example, relaxing standing requirements in a single circuit can have serious negative consequences on *amici*'s ability to compete. The Third Circuit's refusal to comply with this Court's rulings

causes *amici*'s members to suffer disadvantages unique to the geographical location within the circuit's jurisdiction. The action by the Third Circuit has created an uneven competitive "playing field" among *amici* located in the Third Circuit and *amici*'s national competitors in other circuits that do follow this Court's mandates. Further, this decision discourages process innovation and responsible environmental conduct in a global context, which also disadvantages *amici* competitively.

1. The Third Circuit's decision discourages process innovation.

The Third Circuit's decision will discourage businesses such as *amici*'s member companies from developing innovative technology because it is often difficult to predict precisely what discharge parameters will be necessary when applying for a NPDES/NJPDES permit. Because of the nature of innovations, "technical" but otherwise harmless discharge permit violations are bound to occur. Under the Third Circuit's ruling, technical permit excursions will subject companies to extensive liability regardless of whether the violations are intentional or cause harm to plaintiffs or the environment.

Further, the Third Circuit's decision will make the environmental permitting process more complicated and costly since companies will be forced to determine with absolute certainty what permit parameters should be in order to avoid extended litigation in circumstances where accuracy is impossible. Businesses within the Third Circuit will also be prejudiced in that they are potentially subject to massive penalties of up to $25,000 a day under the Clean Water Act for such technical violations.

33 U.S.C. §1319(d). Prevailing parties are also entitled to attorneys' fees under the Act. 33 U.S.C. 1365(d).[2]

New Jersey is at the forefront of research and development in pharmaceutical, robotics, telecommunications and biotechnology. Therefore, *amici* believe there must be a regulatory climate that creates incentives to build and maintain a skilled technical work force and expand existing research and development facilities as well as establish new ones. However, the Third Circuit's ruling is inconsistent with those objectives and will actually have the opposite effect of discouraging any new and innovative processes which puts companies at a competitive disadvantage both nationally and internationally.

The Third Circuit's ruling will discourage businesses from relocating to areas within its jurisdiction. This will adversely effect the overall economy of the region. Moreover, many companies have already left New Jersey, taking thousands of jobs out of state. This is exacerbated by the fact that the permitting process is more difficult than it would be in another location where companies' survival is not threatened by enormous penalties as a result of technical permit excursions. Companies must now take into consideration the fact that they cannot necessarily avoid being subjected to enormous liability because, even if they are able to predict process discharge parameters with relative certainty, it is not always possible to predict natural occurrences. This is precisely what happened to Petitioner. Petitioner could not predict, for example, that the temperature would be higher than is normal for

[2] 33 U.S.C. §1365(d) states in pertinent part:

> The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.

certain periods of the year and that, therefore, temperature excursions would result. Moreover, Petitioner could not predict that geese would inhabit its storage ponds and cause increased levels of total organic carbon ("TOC").

This case illustrates, perhaps better than most, that enthusiasm to protect the environment is still far ahead of an understanding of the environment and its complexity. It also illustrates that rules made with the best of intentions must be flexible enough to allow for subsequent knowledge and that insistence on the pre-eminence of the rules can have a negative environmental impact as well as a negative impact on business.

In this case, the excursions at issue—organic carbon from migrating Canadian geese, thermal impact from the sun, and momentary salt excursions—are all testimony to nature's unpredictability notwithstanding the best efforts of man. Both the TOC from the geese and the "thermal load" from the sun were unrelated to plant manufacturing processes and would have occurred in an equivalent wetland settling had the plant not been involved.

Similarly, the salt excursions and reporting anomalies all were caused by the unpredictability of nature. The salt excursions were due to the inability to predict the variability of a 30 square mile drainage area often days after the discharge event; the reporting violations related to the inability to precisely predict when excursions occurred. The excursions and violations were not substantial. Indeed, it was stipulated between the parties that the salt excursions had *no* environmental impact based on a Limnology Study of the receiving waterway. The reporting violations were a technical matter that never deprived the regulators of the information they required.

All of these violations illustrate two essential points. First, the ecosystem is complex, well beyond man's ability to accurately predict. Second, that prosecutorial discretion on behalf of the regulators is essential for businesses to exist in this environment. In a highly competitive international business climate, innovation in terms of both process and environmental improvement is essential to survival. Allowing unaffected and unharmed individuals to sue for exceedingly large sums of money undercuts any relationship between government and business that otherwise encourages innovation.

It is clear from the numerous disclosures made to the New Jersey Department of Environmental Protection and Energy ("NJDEPE") by the Petitioner concerning the nature of the excursions, that the NJDEPE had elected not to prosecute Petitioner for the technical violations until recently when a public relations campaign initiated by Respondents caused the NJDEPE to take an enforcement role. Nonetheless, the NJDEPE's enforcement actions were tempered by the "reality" of these excursions—finding them to be "unintentional" and imposing a limited civil penalty.

As this Court has said, the primary role of the judiciary is to protect individual rights:

> The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.

Marbury v. Madison, 5 U.S. at 170. This conclusion was, in *amici*'s view, reached for two reasons: the essential separation of powers, and the fact that courts are often ill-equipped to make the complex policy choices which the executive must make and for which it is ultimately responsible to the electorate. Permitting standing without "injury in fact" as the Third Circuit has done in this case thrusts the Courts into the role of executive

policy making and threatens, as this case illustrates, to substantially disadvantage *amici*'s national and international competitive positions.

Further, there is no cost/benefit relationship for businesses as a result of citizen suits where there is no real injury stemming from permit excursions. Businesses may be more inclined to locate to the area if citizen suit litigation produced some corresponding environmental benefit. However, under the Third Circuit's standard which does not include injury in fact or redressibility requirements, business and industry are faced with the burden of increased litigation and massive penalties without any improvement to the environment. Therefore, requiring citizen suit plaintiffs in the Third Circuit to establish an injury in fact makes good business sense and good environmental sense.

2. The Third Circuit's decision discourages improvements to the environment.

Tragically, citizen suit plaintiffs who seek redress without injury generally are not concerned about harm to the environment. Often, such plaintiffs have a less than meritorious ulterior motive. As Judge Aldisert noted in *Powell Duffryn*, these plaintiffs create the lawsuit then look for plaintiffs:

> I see PIRG and FOE in the position of the old-time vaudeville performer's ad in Variety: 'Have tux, will travel.' PIRG and FOE advertised: 'Have case need live-bodied members/plaintiffs.'

Powell Duffryn, 913 F.2d at 84. The reason is that injury to the environment is not the driving force behind the litigation. Instead, it is the generation of visibility for the organization, the competition for dwindling sources of revenue, and the ability to get legal fees for their law firms. When injury in fact and redressibility are deleted from the requirements for standing, these other motives predominate and tragically, as this case illustrates, concern for the environment comes in last, if at all.

There is a clear national policy promulgated by the Department of Agriculture to encourage the development of wetland habitats for migratory water fowl. *See, e.g.*, Water Bank Act, Public Law, 91-559 and 96-182. Petitioner's effluent storage ponds are—albeit inadvertently—now serving that very purpose. In addition, they are doing it in a way that avoids nuisance to the public, without any showing of harm to anyone. Respondents seek to have this habitat destroyed by arguing that Petitioner should have netted or roofed the effluent storage ponds, or used high volume noise devices to scare the geese away. Is that really in the public interest or that of the environment? Nonetheless, it is how Respondents are trying to make their case for civil penalties and legal fees and the court is being asked to make policy choices that should be the province of the executive.

In fact, Alcan Aluminum Corporation, which is an affiliate of Petitioner, developed novel wetland treatment areas at its Oswego, New York plant and at its Logan, Kentucky operation. The Oswego facility developed a nature trail in the wetlands area that is the biological processing area for its oil emulsion. The Oswego facility would be a similar source of TOC from migratory water fowl and such projects would be discouraged by suits such as these despite the environmental benefits.

C. This Court Should Grant Petitioner's Writ Of Certiorari Because A Standing Doctrine Without An Injury In Fact Requirement Undercuts A Working Relationship Between Business And Government.

In *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), this Court reaffirmed the principle that the core of the constitutional standing requirement is injury in fact. The standing requirement is a limitation upon the congressional ability to confer standing, not upon the courts, since the courts do not have such authority.

Justice Scalia has argued that this is the "premise" upon which our system operates. *See* Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881 (1983).

It is *amici*'s contention that government agencies rather than citizen suit plaintiffs provide the appropriate mechanism to make the policy choices necessary for the administration of sophisticated environmental laws and regulations. This is well illustrated by the facts in this case, where standards initially set with the best of intentions have through time become irrelevant in certain respects. As technology develops at an even greater pace, the regulator and the regulated must develop even greater flexibility. The adversarial system by its nature, and the courts by training and limitations in scientific expertise, are simply unable to respond to changes with the rapidity required. Moreover, allowing courts to become formulators of public policy removes the policy formulation from accountability to the electorate.

Does this mean that under certain circumstances laws may be unenforced or underenforced? The answer is yes, as Justice Scalia noted:

> The ability to lose or misdirect laws can be said to be one of the prime engines of social change, and the prohibition against such carelessness is (believe it or not) profoundly conservative. Sunday blue laws, for example, were widely unenforced long before they were widely repealed—and had the first not been possible the second might never have occurred.

Id. at 897. Prosecutorial discretion is especially important when, as here, technical permit violations cause no harm.

1. Businesses need a predictable relationship with government because they need to know who is setting policy.

The injury in fact standard is a needed restriction on who may sue since it dramatically reduces the universe of potential plaintiffs to a factually distinct group of potential litigants. Moreover, where there is injury in fact, there may be redressibility. Absent these limits, businesses are exposed to an unlimited pool of potential plaintiffs whose injuries, if they exist at all, are unrelated to businesses' actions. The net result, is to undercut businesses' relationship with government.

Government agencies charged with enforcing the laws often have long-term contact with those portions of the private sector. Through this mechanism, mutual expectations are developed and understood so the regulator's behavior corresponds to the regulated's expectations. As referenced with respect to Sunday blue laws, failure of the executive to enforce certain elements of a statute has the normal and expected consequence of encouraging the conduct. Where, as in this case, the failure to enforce the regulations is supported by data explaining that the excursions were anomalies and harmed no one, the normal consequence would be for the regulated to develop a level of confidence that this problem is not a priority requiring attention and will be addressed through the permit renewal process.

Lawsuits like this one shatter that process. The flexibility in the enforcement process is eliminated, and a virtual universe of potential plaintiffs must be viewed as being in equivalent policy formulating positions which undercuts prosecutorial discretion.

2. Permitting standing without injury in fact permits policy to be formed by persons other than those responsive to the electorate.

The standard of injury in fact permits individual redressibility when one is injured. It protects the minority's rights when the majority decides forbearance is in its interests. However, permitting a party to sue when uninjured undercuts the fundamental notion of majority rule by permitting an uninjured minority to impose its will on a majority disinclined to act. Such results not only stand the notion of majority rule on its head, it also raises the specter that minority rule has always had at its root—a potential that the real objective of the minority is not the overall interests of the group but the individual interests of the minority. This case and *Powell Duffryn* both illustrate the abuse to which a minority rule doctrine can lead.

If the majority has chosen not to act in its own interest and an uninjured minority chooses to act, the obvious question is "why?" It certainly cannot have the majority interest at heart, nor can it be credibly argued that the minority and the courts can better choose what is in the best interests of the majority. The simple reason is that the minority is acting in its own interests and those interests may well be at cross-purposes with the interests of the majority. This case represents that fact and portends for *amici* and their members a potential deluge of litigation the real objective of which is legal fees, not the environment or redress of injury.

Both *Powell Duffryn* and this case illustrate the plaintiffs' strong desire to use the system to generate legal fees. In this case, for example, Respondents requested attorneys' fees and expenses in excess of $41,000 pertaining only to the interlocutory appeal to the Third Circuit. The Third Circuit reduced that amount by 50% after Petitioners filed a response arguing that Respondents' fee request was excessive and

unreasonable. Respondents subsequently requested a panel rehearing of their application for attorneys' fees and expenses which was denied.

In *Powell Duffryn*, the same plaintiffs were represented by the same law firm and requested attorneys' fees and expenses in the amount of $503,501.72. In support of their fee application, PIRG submitted a 72 page brief, and subsequently filed a 115 page reply brief with a motion to submit an over-length brief. As the United States District Court for the District of New Jersey said, "[t]hese submissions amply demonstrate, to put it charitably, the unbridled exuberance with which PIRG prosecutes their many actions." *PIRG v. Powell Duffryn*, No. 84-340 (D.N.J. April 23, 1991). The court also recognized that plaintiffs' firm has a "reputation for professionally prosecuting environmental cases on a wholly contingent basis . . ." *Id.* The district court decreased the amount requested by almost 50%, stating that many categories were excessive and unreasonable.

As time has progressed, companies are becoming more and more sensitive to their environmental responsibilities. A large part of *amici*'s efforts are devoted to environmental activities. As a consequence, companies are active in ways that are dramatically reducing activities that cause injury. Nonetheless, the more sophisticated the measuring techniques, the greater the attempts to match discharge limits to the variability of nature, the more complex production systems and the greater the change occurring because of the need to innovate, the more likely that anomalous types of excursions will occur. With the disappearance of the "bad polluter", law firms such as Respondents', which are economically dependent on the existence of the "bad polluter", have a greater incentive to bring lawsuits for the potential revenues. The levels of the fee requests in this case and *Powell Duffryn* illustrate the economic reality behind this litigation. Without injury in

fact as a restraint, *amici* are concerned that environmental litigation of this sort driven by fee awards alone—"bring the suit find the plaintiff" in Judge Aldisert's terms—will become the order of the day. It will disrupt businesses' relationship with government and subvert the notion of majority rule.

D. The Third Circuit's Environmental Group Exception To Article III's "Irreducible Constitutional Minimum" Threatens The Longstanding Doctrine Of Associational Standing.

This Court has long held that the doctrine of associational standing is premised, among other things, on the ability of individual members of the association to independently demonstrate that they have standing in their own right. More than twenty years ago, the Court held that "[i]t is clear that an organization whose members are injured may represent those members in a proceeding for judicial review." *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). Three years later, in *Warth v. Seldin*, 422 U.S. 490, 511 (1975), the Court reaffirmed that "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members." In doing so, the Court stated certain conditions an association must satisfy in order to proceed with a lawsuit on behalf of its members. *Id.* In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), the Court reiterated those conditions, as "prerequisites to 'associational standing,' " in the form of the following test:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

The rationale for associational standing is that the association acts merely as an extension of its individual members who have standing to sue in their own right. The relationship between the association and its membership requires a demonstration of individual standing before an association can assert its members' rights. As a result of this symbiotic relationship, any reduction in standing requirements for individual members necessarily makes it easier for the association to advocate on their behalf.

The Third Circuit's refusal to scrutinze individual allegations for immediate or threatened injury in fact substantially reduces the showing an individual must make in order to file a citizen suit under the Clean Water Act. This effectively creates an environmental group exception to Article III's rigorous standing requirements that gives groups like PIRG and FOE—which have no standing in their own right—an unconstitutional free ride to bring a citizen suit. Mere allegations of permit violations without any accompanying showing of actual harm cannot substitute for the demonstration of individualized injury required by this Court.

The Third Circuit's creation of an environmental group exception to Article III is supported neither by the Congress—which has no authority to enable persons who have not suffered a concrete harm to file suit in federal court—nor the Constitution, which demands compliance with Article III from all plaintiffs regardless of whether they are seeking individual or associational standing.

III. CONCLUSION

For all of the foregoing reasons, *amici* respectfully urge this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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April 2, 1993

Kenneth H. Mack, Esquire
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Re: *PIRG v. MEI*

Dear Mr. Mack:

This letter will confirm that counsel for Petitioner, Magnesium Elektron, Inc., consents to the filing of a brief *amici curiae* by the Chemical Industry Council of New Jersey and the New Jersey Chamber of Commerce.

Very truly yours,

/s/ LAWRENCE A. SALIBRA, II
Lawrence A. Salibra, II
Senior Counsel

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